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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-119

KIMBERLY-CLARK CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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KIMBERLY-CLARK CORPORATION,
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioner, Kimberly-Clark Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 14, 1975, which reversed the judgment of the United States District Court for the Western District of Tennessee.

OPINIONS BELOW

The opinion of the Sixth Circuit, reported at 511 F. 2d 1352, is reproduced in the Appendix (p. A-1). The opinion of the District Court, reported at 380 F. Supp. 1106, is reproduced in the Appendix (p. A-24).

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1975. A timely petition for rehearing was denied on April 23, 1975, and this petition for certiorari has been filed within 90 days of that date. A copy of the order denying the petition for rehearing is in the Appendix (p. A-36).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Commission (the "EEOC") may commence a duplicitous suit based on charges raising the same issues of employment discrimination as in a previously commenced class action suit under Title VII?

2. Whether petitioner has been denied due process of law by the EEOC's failure to comply with the notice, conciliation, and determination of reasonable cause requirements of the Equal Employment Opportunity Act of 1972 (the "1972 Act") and its own Regulations?

3. Whether the EEOC may bring suit on a charge which it had processed before the 1972 Act became effective?

4. Whether suit by the EEOC is barred by the 1972 Act time limitations, by a state statute of limitations, or because charges were not timely filed under the Act?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 706(b) and 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended by the 1972 Act [42 U.S.C. §§ 2000e-5(b) and (f)(1)], Section 14 of the 1972 Act [Pub. L. No. 92-261, § 14 (Mar. 24, 1972) 86 Stat. 103], and Section 706(d) of Title VII of the Civil Rights Act of 1964, prior to amendment [Pub. L. No. 88-352 (1964) 78 Stat. 260]. The text of these statutory provisions is set forth in the Appendix (p. A-37).

The relevant EEOC Regulations are §§ 1601.19, 1601.19a, 1601.19b, 1601.19c and 1601.19d [35 Fed. Reg. 3163, 10110 (1970)]; §§ 1601.1, 1601.22, and 1601.23 [29 C.F.R. §§ 1601.1, 1601.22, and 1601.23]; § 1601.25 [30 Fed. Reg. 8409 (1965)]; and § 1601.25a [35 Fed. Reg. 3164, 10110 (1970)]. The text of these Regulations appears in the Appendix (p. A-40).

STATEMENT OF THE CASE

The EEOC commenced this suit on February 2, 1973, under the 1972 Act. The allegations of racial discrimination were based on a single charge (the "Munn charge") which was already the subject of a separate pending class action. The bulk of the charges upon which the allegations of sex discrimination were based (the "Meek group charges") had been previously settled pursuant to EEOC predecision settlement procedures under its Regulations. The EEOC had not given the "last chance" notice required under its Regulations with respect to these or any of the other charges. EEOC Reg. § 1601.23. Each of the charges had been investigated and processed by the EEOC before the 1972 Act became effective on March 24, 1972.

1. **The 1971 Charges**

The Meek group charges, filed with the EEOC between January and June of 1971, contained virtually identical allegations of sex discrimination—the loss of service credit during layoffs which had occurred over five years before the charges were filed; no determination of reasonable cause has ever been issued.[1] (A. 61-92, 168). The Dunavan charge, also filed in 1971, alleged sex discrimination concerning female oilers at petitioner's Memphis mill; the EEOC issued a determination of reasonable cause on August 17, 1971.[2] (A. 93, 112).

While the EEOC was investigating the Meek group charges, petitioner submitted to the EEOC a statement on July 23, 1971 showing not only that the charges involved matters which had been previously litigated and settled but also that the charges were untimely filed since they had been filed more than 90 days after the loss of service credit had occurred in 1965 and 1966 as a result of layoffs.[3] (A. 263).

Upon completion of its investigation of the Meek group charges on October 4, 1971, the EEOC sent petitioner a

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[1] References to the Joint Appendix used in the Court of Appeals, which has been certified to this Court at petitioner's request, will be set forth as "A. ...."

[2] Investigation of the Dunavan charge was completed by June 23, 1971, when the EEOC issued findings of fact, to which petitioner filed exceptions. (A. 189, 112).

[3] The issues raised by the Meek group charges had already been the subject of class action litigation under Title VII based on prior EEOC charges filed by the Meek group, among others. Cooper v. Kimberly-Clark Corp., Civil Action No. C-66-251, W.D. Tenn., Sept. 1, 1966. (A. 229, 239, 249, 284). The Cooper class action had been settled and adjudicated on the merits on December 8, 1967, with a monetary payment in full satisfaction of all claims arising out of the 1965 and 1966 layoffs. (A. 260, 284). The Meek group were all members of the class in that litigation. (A. 229, 258, 259, 284).

copy of its Regulations, its findings of fact, and notified petitioner that it could file exceptions to the findings of fact and invited petitioner to enter into predecision settlement discussions. EEOC Reg. § 1601.19c. (A. 176, 185). The letter stated, "Should negotiations be concluded satisfactorily, no Commission decision would issue and further proceedings under Title VII would be avoided." (A. 185, 186).

Pursuant to the Regulations, petitioner filed exceptions and, even though there had been no determination as to reasonable cause, began informal settlement discussions with the local union, which was one of the Meek group charging parties. (A. 207, 208). As a result of the predecision settlement discussions, petitioner, local union, the Meek group, and all other employees similarly situated entered into a written settlement agreement which granted all relief requested—service credits for the 1965-66 layoffs. (A. 49, 122, 142). Each Meek group charging party also executed a request addressed to the EEOC that her charge be withdrawn, stating that all pending differences with petitioner had been settled. (A. 49, 131-141).

Although the EEOC admits that it had been fully aware of the terms of the settlement before the agreement was signed (A. 158, 159) and has never objected to it, the EEOC on December 4, 1972 sent a letter to counsel for petitioner which referred to both the Meek group and Dunavan cases, ignored the settlement agreement, and stated in part:

> The Commission feels that too much time has elapsed *without an affirmative effort* by the Respondent *to resolve the issues* in these cases. Since it is felt that further delays will not be productive, the Commission is *terminating its efforts to conciliate* these cases effective on the date of this letter.
>
> (A. 187, 188) (emphasis added)

This letter failed to give the "last chance" notification required by Section 1601.23 of the Regulations. The wording of the letter, almost identical to the first sentence of Section 1601.23, failed to state that petitioner could request that conciliation efforts be resumed or to specify any time period during which it could do so. Furthermore, as to the Meek group charges, the EEOC had failed to follow the steps required under its own Regulations; it had not made a determination of reasonable cause or dismissed the charges.[4] (A. 48, 208, 286).

Counsel for petitioner assumed the EEOC was unaware of the settlement, and after responding by telephone to the EEOC's notification, wrote a letter to the EEOC on January 9, 1973 confirming that the service dates had been adjusted as requested and enclosing withdrawal of charges request forms signed by each member of the Meek group. Counsel thanked the EEOC for having helped resolve the issues (A. 142, 143).

Rather than responding to the letter or objecting to the settlement, the EEOC three weeks later instituted this suit. (A. 158, 159, 164, 165).

2. The 1968-69 Charges

The Williams group-Johnston charges filed in 1968 and early 1969 alleged sex discrimination in promotion and overtime. (A. 51-60). When the EEOC made a determination of reasonable cause two years later, it contacted petitioner regarding conciliation discussions. (A. 102-111, 171, 174).

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[4] EEOC Regulations §§ 1601.19c and 1601.19d provided that if the informal predecision settlement discussions were unsuccessful, the file would be forwarded for determination, after which conciliation would take place only if reasonable cause was found. 35 Fed. Reg. 3163 (1970).

The conciliation consisted solely of a letter mailed to petitioner by the EEOC on May 4, 1971, enclosing for review proposed conciliation agreements. (A. 163, 173). By that time through the actions of petitioner, the issues had long since been resolved (A. 49), and on May 21, 1971, petitioner responded with a letter which stated:

> It is our belief that actions taken by respondent to date basically resolve the issues involved. Consequently, we have concluded that signing the proposed conciliation agreements is unnecessary and would serve no further purpose.
>
> (A. 120)

Although the EEOC then notified the charging parties—but not petitioner—that conciliation efforts had failed, the EEOC has never taken exception to petitioner's statement that the issues were resolved nor has it ever issued any "last chance" notification to petitioner pursuant to the EEOC Regulations or otherwise. (A. 49). When the EEOC filed suit in February of 1973, it had then been over a year and a half since the EEOC's last action with regard to the charges. (A. 162-164).

3. The 1969 Charges of Racial Discrimination

The Munn charge filed in 1969 is the sole charge of racial discrimination upon which this suit was based. (A. 97-101, 119). Investigation of the charge was completed by September 21, 1970, and the EEOC issued findings of fact, to which petitioner filed exceptions. (A. 166, 193, 116).

A year and a half later, on May 15, 1972, the EEOC dismissed the allegations of discrimination in recruitment and hiring and the seniority system but found reasonable cause

to believe discrimination had occurred in promotion and job classification only. (A. 116). By letter dated June 6, 1972 accompanying the determination, the EEOC stated a conciliator would "propose a written conciliation agreement." (A. 195). No such agreement has ever been proposed. (A. 167).

Pursuant to a notice of the right to sue issued by the EEOC at Munn's request, Munn filed a class action under Title VII on August 31, 1972.[5] (A. 49, 144, 197, 270). The EEOC made two telephone calls to counsel for petitioner to inquire about the possibility of conciliation, but took no further action after the class action was filed, and issued no "last chance" notice under EEOC Regulations or otherwise. (A. 167).

No attempt was made by the EEOC to intervene in the Munn class action; instead the EEOC filed this suit which contains virtually identical allegations of racial discrimination (A. 274, 275). Months after petitioner's motion for summary judgment had been argued, the EEOC filed a motion to consolidate this suit with the existing class action. (A. 270). The Munn class action is still pending.

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[5] EEOC Regulation § 1601.25a(d) provided that issuance of the notice of the right to sue shall suspend further EEOC proceedings unless the field director determines that it is in the public interest to continue such proceedings. 35 Fed. Reg. 3164 (1970). The record shows no such determination.

REASONS FOR GRANTING THE WRIT

As the Sixth Circuit recognized, this case "presents several procedural questions of importance" to the EEOC and those bringing and defending charges filed with the EEOC. 511 F.2d at 1353. The Sixth Circuit's decision is based upon a misreading of this Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and a fundamental misunderstanding of the differences between the prerequisites for and proper scope of an EEOC suit and those of a charging party's action under Title VII. The decision below decimates the statutory rights and due process protections of employers and unions under Title VII. Among the many disturbing results of the decision are:

(a) The EEOC may litigate in a separate action instituted against the same defendant the same issues raised in a class action previously brought under Title VII, whether the class action is still pending, already litigated, settled, or adjudicated on the merits.

(b) After issuing and publishing Regulations governing the procedures under the statute, the EEOC may then ignore them at will; it may sue regardless of whether it has ever made a determination of reasonable cause or followed the other mandatory requirements of Sections 706(b) and 706(f)(1) of the Act and its own Regulations.

(c) After determining that there is no reasonable cause as to certain issues raised by a charge, the EEOC may nevertheless institute suit raising the very issues it has dismissed.

(d) The EEOC without any time limitation whatsoever may continue to sue on stale charges, even those fully processed long before the effective date of the 1972 Act.

I

There is an irreconcilable conflict between the Sixth Circuit and the Eighth Circuit as to whether the EEOC, after a charging party has filed a Title VII class action pursuant to a right-to-sue notice, may file a separate action based upon the same charge as the pending class action. *EEOC* v. *Missouri Pacific R.R.*, 493 F. 2d 71 (8th Cir. 1974); *EEOC* v. *Cronin*, — F. 2d —, 7 FEP Cases 1258 (8th Cir. Apr. 23, 1974). The Sixth Circuit recognized this conflict when it "respectfully disagree[d] with the Eighth Circuit's conclusion." 511 F.2d at 1363 n. 15.

The Eighth Circuit in *Missouri Pacific* examined the statutory scheme and Congress' concern about duplicitous suits and held that "the statute cannot be read to warrant duplicitous lawsuits when both actions find their genesis in one unlawful employment practice charge" and that "once the charging party has filed suit pursuant to a 'right to sue' notice, the Commission is relegated to its right of permissive intervention." 493 F.2d at 74, 75.

The Sixth Circuit, on the other hand, held that the EEOC, after issuing a right-to-sue notice, may file a separate suit rather than seeking to intervene in the class action brought by the charging party based on the same charge. The Sixth Circuit renders the acknowledged Congressional intent that duplicitous proceedings be avoided almost meaningless by applying this mandate only in the rare situation "when the EEOC's action parallels that of the private party, raising no substantially different issues and seeking no relief *other than for the private party.*" 511 F.2d at 1363 (emphasis added). See *EEOC* v. *Huttig Sash & Door Co.*, 511 F. 2d 453 (5th Cir. 1975). Under the Sixth Circuit's analysis, when the charging party's suit is a class action, as in the case at hand, no EEOC suit would be duplicitous unless it was much narrower than the class

action—unless it sought relief solely for the charging party.[6]

The Sixth Circuit further rendered the concept of avoiding duplicitous suits meaningless when it held that the EEOC is not barred by res judicata or collateral estoppel where a charging party has sued and the suit has been settled or adjudicated on the merits. 511 F.2d at 1361. Under this reasoning, a charge is alive forever—unless the EEOC was actually a party to the action—regardless of the fact that the 1972 Act specifically gives the EEOC the first opportunity to sue by precluding the charging party from suing during the 180 day period after the filing of a charge. The alarming prospect for the courts, for employers, and for unions is that the decision gives the EEOC the authority to relitigate the thousands of Title VII class action suits to which it was not a party.

II

It is respectfully submitted that the Sixth Circuit incorrectly interpreted this Court's decision in *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. 792; it misconceived the difference between suit by a charging party under Title VII and suit by the EEOC when it (i) held that the proper scope of an EEOC suit is determined by the scope of the investigation likely to result from a charge rather than by the scope of the reasonable cause determina-

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[6] In the present case, the Sixth Circuit is in error in stating that the EEOC suit encompassed allegations extending beyond the Munn class action complaint. Both the Munn charge and the Munn class action suit contained broad and general allegations of racial discrimination; the issues raised by the allegations and the relief sought in the EEOC suit and Munn class action are the same. Indeed, the EEOC suit should properly have been narrower than the class action, since the EEOC dismissed some of the allegations of the Munn charge, including that of discrimination in hiring.

tion, (ii) suggested that the EEOC might be allowed to sue under Section 706(f)(1) even if it failed to make a determination as to reasonable cause, and (iii) held that petitioner was not prejudiced by the lack of a "last chance" notice required by EEOC Regulations dealing with conciliating matters in which reasonable cause has been found. The logical conclusion of the Sixth Circuit's decision is that the conciliation requirements of the 1972 Act are mere procedural technicalities and that the EEOC could base a suit on a charge even after having found no reasonable cause or having dismissed that charge. The court's decision is contrary to the statute and the Congressional intent, and conflicts with decisions of the Eighth Circuit. *EEOC* v. *Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974); *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974); *EEOC* v. *Missouri Pacific R.R., supra*, 493 F.2d at 74.

This Court has held in *McDonnell Douglas* that the absence of a reasonable cause finding cannot bar a Title VII suit by a charging party. 411 U.S. at 798. The charging party's right to sue is not restricted to those matters for which there was a finding of reasonable cause by the EEOC. The charging party may sue if the EEOC dismisses a charge. Congress made it clear that a charging party is not to be penalized by the derelictions of the EEOC and therefore may sue "where there is agency inaction, dalliance or dismissal of a charge." 118 Cong. Rec. 7168 (1972). This Court did not suggest in *McDonnell Douglas*, however, that these principles apply to an EEOC suit.

To the contrary, it is apparent from the statutory scheme that Congress did not intend that the EEOC sue after dismissing a charge. Under Section 706(f)(1) the EEOC may not sue unless it is "unable to secure . . . a conciliation

agreement acceptable to the Commission." A necessary part of this statutory prerequisite is a bona fide attempt at conciliation *after* a determination of reasonable cause pursuant to Section 706(b). *EEOC* v. *Missouri Pacific R.R., supra*, 493 F.2d at 74; *EEOC* v. *Louisville & N. R.R.*, 505 F.2d 610, 617 (5th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3572 (Apr. 15, 1975) (No. 74-1294); *EEOC* v. *duPont*, 373 F.Supp. 1321, 1333 (D. Del. 1974), *aff'd*, — F. 2d —, 10 FEP Cases 916 (3rd Cir. May 9, 1975); EEOC Reg. § 1601.22, 29 C.F.R. § 1601.22. If the EEOC dismisses a charge, the EEOC has nothing to conciliate or to litigate; it has nothing further to do except to notify the charging party of the right to sue.

The Sixth Circuit's misconception of the prerequisites for an EEOC suit leads the court to conclude that its doctrine in *Tipler* v. *duPont*, 443 F.2d 125, 131 (6th Cir. 1971) —that the scope of the complaint in a charging party's suit is "only limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination"—is equally applicable to an EEOC suit. 511 F.2d at 1363. A review of the mandatory steps of Sections 706(b) and 706(f)(1) indicates clearly that the scope of an EEOC suit is determined by the scope of the reasonable cause finding. *EEOC* v. *duPont, supra*, 373 F.Supp. at 1336-1338. Only as to those matters for which reasonable cause has been found is there something for the EEOC to conciliate or perhaps litigate.

Although Congress in the 1972 Act created the EEOC's right to bring suit, it did so with the express limitation that "only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement" 118 Cong. Rec. 7563 (1972). While noting this directive elsewhere in its opinion [511 F.2d at 1357], the Sixth Circuit ignores it when considering the failure of the EEOC to give the required "last chance"

notice under EEOC Regulation § 1601.23 as a mere technical error not prejudicial to petitioner.

The Sixth Circuit erroneously equated a notice of the failure of conciliation with the "last chance" notice. This holding violates fundamental due process rights of respondents and is contrary to the overriding purpose of the Act, which establishes a comprehensive scheme for resolving matters through voluntary compliance. Knowledge that an EEOC suit may be imminent is of no value when the respondent is left helpless to avoid the suit.

Here, the EEOC gave no "last chance" to petitioner prior to instituting this suit but merely announced that conciliation was being terminated immediately. Petitioner's response to the EEOC's letter was ignored. No chance was ever given to petitioner to modify the Meek group settlement, and thus avoid litigation. The EEOC never indicated that it thought the Meek group was entitled to different or additional relief. In fact, the merits of the charges had not been determined by the EEOC, and in view of the late filing of the charges and the previous adjudication of the same issues on the merits in *Cooper* v. *Kimberly-Clark Corp.*, *supra*, petitioner properly expected that the EEOC would dismiss the charges.

The Sixth Circuit further held that the mere notice of failure of conciliation regarding one charge was a sufficient "last chance" notice regarding all charges upon which suit was based. Petitioner had no indication that the long dormant 1968-69 Williams-group charges were being resurrected or that the EEOC in any way disagreed with petitioner's statement that those issues had been resolved. Petitioner was given no indication that the EEOC desired to conciliate the Munn charge already being litigated in an existing class action. Never did the EEOC indicate

what action it desired in order to resolve the Munn, Dunavan, or Meek group charges.

By improperly resurrecting the Williams group charges, the EEOC increased the potential back pay liability of petitioner to hundreds of female employees in the mill by almost three years, since back pay liability is measured from two years prior to the filing of a charge rather than from the date suit is filed. *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880, 4882 n. 3 (U.S. June 25, 1975). Substantial prejudice is therefore present.

The Sixth Circuit's decision is in direct conflict with *EEOC* v. *Hickey-Mitchell Co.*, *supra*, 507 F.2d 944 (8th Cir. 1974), which the court did not cite or make any attempt to distinguish. In *Hickey-Mitchell*, the court rejected the argument that failure to give the "last chance" notice was a mere technical error which did not prejudice the defendant and held that Regulation § 1601.23 "reflects formal recognition by the Commission of the need to keep the doors of communication open even where, as here, it has received a flat refusal to engage in conciliation discussions." 507 F.2d at 948.

The Sixth Circuit's decision with respect to the prerequisites for an EEOC suit and the lack of necessity for compliance with the Regulations is in conflict not only with the Eighth Circuit decisions in *Hickey-Mitchell* and *Missouri Pacific* but also with the decision of every district court considering these issues.[7] This conflict has been pre-

[7] EEOC v. Raymond Metal Prod. Co., 385 F.Supp. 907, 926 (D. Md. 1974); EEOC v. Western Elec. Co., 382 F. Supp. 787, 796, 797 (D. Md. 1974); EEOC v. United States Pipe & F. Co., 375 F.Supp. 237 (N.D. Ala. 1974); EEOC v. duPont, *supra*, 373 F.Supp. at 1333; EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974); EEOC v. Firestone Tire & Rubber Co., 366 F.Supp. 273 (D. Md. 1973); EEOC v. Container Corp. of Amer., 352 F.Supp. 262, 265 (M.D. Fla. 1972). *But cf.* EEOC v. Louisville & N. R.R., *supra*, 505 F. 2d 610.

sented in the pending petition for certiorari in *EEOC* v. *Louisville & N. R.R., supra,* 43 U.S.L.W. 3572 (Apr. 15, 1975) (No. 74-1294). The Sixth Circuit's decision is also in conflict with the Eighth Circuit's decision in *Brennan* v. *Ace Hardware Corp., supra,* 495 F. 2d 368, involving the virtually identical conciliation requirements under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* These important, recurring procedural and due process questions need to be resolved by this Court.

III

The Sixth Circuit's decision that the charges upon which this suit was based were "charges pending with the Commission on the date of enactment" of the 1972 Act within the meaning of Section 14 is inconsistent with Congressional intent, is contrary to the construction of the 1972 Act by the EEOC's own implementing Regulations, and makes the 1972 Act virtually retroactive to July 2, 1965.

When issuing amendments to its Regulations in 1970, the EEOC made them applicable to "charges presently pending" with the EEOC, and when questions arose as to the meaning of "charges . . . pending," the EEOC published a clarification in the Federal Register which stated:

> The unnumbered introduction states that this amendment "shall be applicable with respect to charges presently pending before or hereafter filed with the Equal Employment Opportunity Commission." Under internal Commission procedures, individual charges have been treated an[d] denominated as such until the completion of investigation (i.e., completion of the Final Investigative Report) at which time the matter is considered a "case" and a case number is assigned. Accordingly, the above quoted introductory statement was intended to make the amendment applicable only to "charges" as to which the investigation had not been completed prior to the effective date thereof, and not with respect to "cases" where the investigation had been completed.
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> 35 Fed. Reg. 10110 (June 19, 1970)

When new Regulations were issued specifically to implement the 1972 Act, again they were made applicable to "charges presently pending"—making it clear that the EEOC considered the 1972 Act to be applicable only to charges that had *not* been investigated at that time. 37 Fed. Reg. 9215 (May 6, 1972); 37 Fed. Reg. 20165 (Sept. 27, 1972). On the other hand, when new sex discrimination guidelines not connected with the 1972 Act were issued, the EEOC made them applicable to "charges *and cases* presently pending" with the EEOC. 37 Fed. Reg. 6835 (Apr. 5, 1972) (emphasis added).

The investigation of all of the charges upon which this suit is based had been completed and an EEOC case number assigned long before the effective date of the 1972 Act. In its administrative interpretation of Section 14 in its Regulations, the EEOC has determined that the 1972 Act is not applicable to any such pre-1972 Act "charges" which had become "cases."

The administrative interpretation is consistent with the legislative history and is entitled to great deference. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433, 434 (1971); *cf. Corning Glass Works* v. *Brennan,* — U.S. —, 94 S. Ct. 2223, 2231 (June 3, 1974). The Justice Department letter which prompted Senator Javits to introduce an amendment to make the 1972 Act applicable to "charges pending" indicated a desire to make the 1972 Act applicable to charging

p. ties who had "waited as long as 18 months to two years" for resolution of their charges. *EEOC* v. *Christiansburg Garment Co.*, 376 F. Supp. 1067, 1074 (W.D. Va. 1974); 118 Cong. Rec. 4816 (1972). The letter must have referred to uninvestigated charges. According to the Annual Reports of the EEOC, of the 37,049 charges filed from June 30, 1969 to June 30, 1971, investigation was completed on only 12,411 of the charges. There was, therefore, a sizeable backlog of uninvestigated charges during this two year period.[8]

Resolution of the meaning of "charges pending" is of nationwide importance since approximately 100,000 charges were filed prior to the effective date of the 1972 Act. For example, it is undisputed that conciliation efforts had ceased by the end of May of 1971 on the 1968-69 sex discrimination charges here involved. When the EEOC thereupon issued to the charging parties notice of the failure of conciliation, the administrative procedure had come to an end. *Tuft* v. *McDonnell Douglas Corp.*, — F.2d —, 10 FEP Cases 929, 931 (8th Cir. May 27, 1975). By allowing the EEOC to resurrect such stale charges, the Sixth Circuit's decision makes the 1972 Act virtually retroactive to July 2, 1965, and is in conflict with Congressional intent and the decisions of the only district courts which have considered the issue.[9]

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[8] These figures have been obtained from the data in the "Appendix" of the Fifth and Sixth Annual Reports published by the EEOC in compliance with Section 705(e) of Title VII, as amended.

[9] EEOC v. Christiansburg Garment Co., *supra*, 376 F.Supp. 1067, in which the court rejected the EEOC's argument that any charge filed after July 2, 1965 and not dismissed by it or resolved by conciliation was a pending charge and held that Section 14 is not applicable to charges no longer in the process of negotiation and conciliation; EEOC v. Wilson & Co., 387 F.Supp. 1224 (D. Colo. 1975); White v. Texaco, Inc., 7 FEP Cases 367 (S.D. N.Y. Dec. 10, 1973); Guthrie v. Colonial Bakery Co., 6 FEP Cases 662 (N.D. Ga. Mar. 8, 1973); 118 Cong. Rec. 718, 4816 (1972).

IV

In refusing to find or apply any time limit for the EEOC to bring suit under Section 706(f)(1) or to apply any applicable state statute of limitations, the Sixth Circuit stated that "so long as employment discrimination . . . persists, a time limit for suit seems unwarranted." 511 F.2d at 1358 n. 9. The Sixth Circuit's holding that a state statute of limitations does not run against the EEOC in a Title VII case is in irreconciliable conflict with the Fifth Circuit's later decision in *EEOC* v. *Griffin Wheel Co.*, 511 F. 2d 456 (5th Cir. 1975), in which the court found that to the extent a complaint seeks recovery for back pay, the suit is private in nature and must be filed within the period specified in the state statute of limitations.

Recently this Court stated that there is not anything "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson* v. *Railway Express Agency*, 43 U.S.L.W. 4623, 4626, 4627 (U.S. May 19, 1975). As this Court further stated in that decision:

> Although any statute of limitations is necessarily arbitrary, the length of period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.
>
> 43 U.S.L.W. at 4626

The Sixth Circuit saw no reason for concern that the "EEOC may sue indefinitely based on a single charge, however stale and ancient" because "Congress has expressly limited employers' liability for back pay to two

years of a charge's filing."[10] 511 F.2d at 1358 n. 9. That statutory provision is of little protection to an employer sued in 1972 on a 1968 charge in which liability would extend back to 1966, as in the case at hand, or to another employer or union which might be sued at any future time based on a 1965 charge.

Although the Sixth Circuit's decision as to whether the EEOC must sue within 180 days after the filing of a charge is consistent with four other circuits, many well reasoned district court decisions have found otherwise after examining the statutory scheme and legislative history.[11] The issue is presented in petitions for certiorari in *EEOC* v. *Louisville & N. R.R., supra,* 43 U.S.L.W. 3572 (Apr. 15, 1974) (No. 74-1294), in *EEOC* v. *General Dynamics Corp.*, 43 U.S.L.W. 3603 (May 2, 1975) (No. 74-1378), and in *EEOC* v. *International Ass'n of Mach.*, 43 U.S.L.W. 3626 (May 16, 1975) (No. 74-1444).

The Sixth Circuit further ignored petitioner's claim that the 1971 Meek group charges were untimely filed. Yet under Title VII, charges had to be filed within 90 days after the act of discrimination. Title VII, § 706(d), 78 Stat. 260

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[10] The Sixth Circuit has misapplied the reasoning of the Court in Love v. Pullman Co., 404 U.S. 522 (1972), when stating that if the EEOC could seek the same relief by filing a fresh charge, requiring suit on a fresh rather than a stale charge is a mere procedural technicality, 511 F.2d at 1358. The scope of the suit and relief which could be sought differs radically, obviously prejudicing the defendant.

[11] EEOC v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3465 (Feb. 24, 1975); EEOC v. Louisville & N. R.R., *supra,* 505 F.2d 610 (5th Cir. 1974); EEOC v. duPont, *supra,* 10 FEP Cases 916 (3rd Cir. 1975); Tuft v. McDonnell Douglas Corp., *supra,* 10 FEP Cases 929 (8th Cir. 1975). For contrary district court decisions, see EEOC v. Wilson & Co., *supra,* 387 F.Supp. 1224 and the decisions listed by the Sixth Circuit at 511 F.2d 1355 n. 5.

(1964), *as amended,* 42 U.S.C. § 2000e-5(e) (1972). Here, the Meek group charges were not filed until almost five years after the events complained of occurred and thus could not in any event be a basis for an EEOC suit. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 798.

Under the Sixth Circuit's decision, the time period during which an employer or union is exposed to monetary liability and other sanctions is under the full and complete control of an agency which can sue without any established time limitation. The lack of limitations is contrary to a basic tenet of the common law—that there should be an end to litigation. It is a curious anomoly in view of the strict time limitations on suit by a charging party.

CONCLUSION

The cumulative effects of the holdings in the Sixth Circuit's decision and the far-reaching effects of that decision emphasize the impelling need for this Court to review the decision below. The need to avoid wasteful duplication of litigation and consequent burden on the federal courts, the need to have an end to litigation, and the need to have government agencies abide by their own regulations are all needs which cry out for the attention of this Court.